

REMARKS

After entry of this Amendment, the pending claims are: claims 1-7, 11-14, 16-19, and 22-27. The Office Action dated October 31, 2007 has been carefully considered. Claims 8-10, 15, 20 and 21 have been canceled without prejudice. Claims 1, 11, 12 and 16 have been amended. Claims 22-27 have been added. Support for the amendments to claims 1, 11, 12 and 16 and for newly added claims 22-27 can be found throughout the Specification and Drawings and specifically in paragraph Nos. 38-40 and drawing Nos. 1, 2 and 4. No new matter has been added. Reconsideration and allowance of the pending claims in view of the above Amendments and the following Remarks is respectfully requested.

In the Office Action dated October 31, 2007, the Examiner:

- provisionally rejected claims 20 and 21 under 35 U.S.C. 101 as claiming the same invention as that of claims 19 and 20 of copending Application No. 10/538,950;
- rejected claims 1-7 under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 7,273,496 Mitchel ("Mitchel") in view of U.S. Patent No. 6,610,093 to Pisharodi ("Pisharodi");
- rejected claims 14-19 under 35 U.S.C. 103(a) as being unpatentable over Mitchel in view of Pisharodi and in further view of U.S. Publication No. 2002/0052656 to Michelson ("Michelson"); and
- rejected claims 8-13 and 20-21 under 35 U.S.C. 103(a) as being unpatentable over Mitchel in view of Pisharodi and in further view of U.S. Publication No. 2004/0143332 Krueger et al. ("Krueger").

TERMINAL DISCLAIMER

Claims 20 and 21 were provisionally rejected as claiming the same invention as copending Application No. 10/538,950. Claims 20 and 21 have been canceled without prejudice. Thus, it is respectfully submitted, that this rejection is moot. Withdrawal of this rejection is respectfully requested.

INDEPENDENT CLAIM 1

Independent claim 1 was rejected under 35 U.S.C. 103(a) as being unpatentable over Mitchel in view of Pisharodi. As amended, independent claim 1 recites, *inter alia*, an intervertebral implant comprising an upper section and a lower section wherein the two sections are moveable in relation to each other via two joints arranged between the two sections, wherein each joint comprises a first joint element with at least one axle and a second joint element with at least one bearing shell receiving the axle and roll bodies inserted between the axles and the bearing shells and wherein one of the side areas of the upper section includes a depression for receiving at least a portion of an insert member, and one of the side areas of the lower section includes a depression for receiving at least another portion of the insert member, the insert member being threadably coupled to one of the upper and lower sections so that the position of the upper section can be temporary fixed with respect to the lower section.

Mitchell discloses an intervertebral implant 100 having an upper plate 110, a lower plate 120, and a third part 130 disposed between the upper and lower plates 110, 120, wherein the third part 130 is in the form of a cross-bar.

Pisharodi discloses a vertebral disk stabilizer 10 having an upper bracket 22, a lower bracket 24, and an intervertebral disk 26. The upper and lower brackets 22, 24 each include a rib 38, 40 sized and configured for mating with a groove 39, 41 formed in the top and bottom surfaces of the intervertebral disk 36. The grooves 39, 41 including a plurality of bearing surfaces 52, 54.

As admitted by the Examiner, Mitchell fails to disclose roll bodies inserted between the axles and the bearing shells. Rather the Examiner relies upon Pisharodi to disclose roll bodies inserted between the axles and the bearing shells. Without addressing the merits of this argument, in order to expedite prosecution of the present application, independent claim 1 has been amended to recite wherein one of the side areas of the upper section includes a depression for receiving at least a portion of an insert member, and one of the side areas of the lower section includes a depression for receiving at least another portion of the insert member, the insert member being threadably coupled to one of the upper and lower sections so that the position of the upper section can be temporary fixed with respect to the lower section. It is respectfully submitted that neither Mitchell or Pisharodi, either alone or in combination, disclose, teach or suggest a depression formed in one of the side areas of the upper and lower sections for receiving an insert member wherein the insert member is threadably coupled to one of the upper and lower sections for temporary fixing the position of the upper and lower sections with respect to one another.

Therefore, for at least this reason, it is respectfully submitted that neither Mitchell or Pisharodi, either alone or in combination, disclose, teach or suggest all of the limitations of independent claim 1. Thus, it is respectfully submitted that independent claim 1 is allowable over the cited prior art. Withdrawal of this rejection and allowance of independent claim 1 is respectfully requested.

Furthermore, as claims 2-7, 11-14, and 16-19 all depend from independent claim 1, it is submitted that these claims are equally allowable for at least this reason. Withdrawal of these rejections and allowance of claims 2-7, 11-14, and 16-19 is also respectfully requested.

With respect to claims 14 and 16-19 which were rejected under 35 U.S.C. 103(a) as being unpatentable over Mitchel in view of Pisharodi and in further view of Michelson, it is respectfully submitted that Michelson does not overcome the short comings of Mitchel and Pisharodi. Michelson was cited for the proposition that it would be obvious for one of ordinary skill in the art to incorporate two threaded holes passing from the interior of the implant through the apposition surfaces for receiving

bone fixation devices. Without addressing the merits of this argument, it is respectfully submitted that, for at least the above-identified reason, neither Mitchel, Pisharodi or Michelson, either alone or in combination, disclose, teach or suggest all of the limitations of dependent claims 14 and 16-19. Thus, it is respectfully submitted that dependent claims 14 and 16-19 are allowable over the cited prior art. Withdrawal of these rejections and allowance of dependent claims 14 and 16-19 is respectfully requested.

With respect to claims 11-13 which were rejected under 35 U.S.C. 103(a) as being unpatentable over Mitchel in view of Pisharodi and in further view of Krueger, it is respectfully submitted that Krueger does not overcome the short comings of Mitchel and Pisharodi. Krueger was cited for the proposition that it would be obvious for one of ordinary skill in the art to incorporate a dovetailed shape insert and a complimentary depression in the plates to block mobility. It is respectfully submitted that there is absolutely no disclosure, teaching or suggestion in Krueger of providing an insert member threadably coupled to one of the upper and lower sections. Rather, Krueger discloses an insertion instrument 210 having extensions 218 which contact the upper and lower plates. Therefore, it is respectfully submitted that neither Mitchel, Pisharodi or Krueger, either alone or in combination, disclose, teach or suggest all of the limitations of dependent claims 11-13. Thus, it is respectfully submitted that dependent claims 11-13 are allowable over the cited prior art. Withdrawal of these rejections and allowance of dependent claims 11-13 is respectfully requested.

NEWLY ADDED INDEPENDENT CLAIM 22

Newly added independent claim 22 recites, *inter alia*, an intervertebral implant comprising an upper member, a lower member and a central joint element wherein a bottom surface of the upper member is operatively coupled to a top surface of the central joint element so that the upper member is moveable with respect to the central joint element about a first swivel axis, and a top surface of the bottom member is operatively coupled to a bottom surface of the central joint element so that the bottom member is moveable with respect to the central joint element about a second swivel axis and wherein at

least one of the side surfaces of at least one of the upper and lower members includes at least one elongated hole, the at least one elongated hole receiving a cam operatively associated with the central joint element, the interaction of the cam and the at least one elongated hole controlling the amount of movement between the central joint element and at least one of the upper and lower members.

It is respectfully submitted that the cited prior art does not disclose, teach or suggest at least one elongated hole formed in at least one of the side surfaces of the upper and lower members for receiving a cam operatively associated with the central joint element in order to control the amount of movement between the central joint element and at least one of the upper and lower members.

For at least this reasons, it is respectfully submitted that that the cited prior art does not disclose, teach, or suggest all of the limitations of newly added independent claim 22. Thus, it is respectfully submitted that independent claim 22 is allowable over the cited prior art. Allowance of independent claim 22 is respectfully requested.

Furthermore, as newly added dependent claims 23-27 all depend from independent claim 22, it is submitted that these claims are equally allowable. Allowance of claims 23-37 is also respectfully requested.

CONCLUSION

A fee of \$120.00 is believed due for this submission for the Petition for a one month extension of time. The Commissioner is authorized to charge this and any other fee which may now or hereafter be due in this application to Deposit Account No. 19-4709.

In the event that there are any questions, or should additional information be required, please contact Applicants' attorney at the number listed below.

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Respectfully submitted,

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